# Solid Kitchen Sdn Bhd v Regal Development Sdn Bhd

HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING-UP NO D6–28–382 OF 1998
REKHRAJ J
15 JULY 1998

***Companies and Corporations*** — *Winding up — Stay of proceedings — Judgment debt subject to further appeal disputed — Whether petitioner could petition for winding up of respondent company — Whether court could exercise its discretion to stay proceedings pursuant to O 92(4) of the Rules of the High Court 1980 or under the inherent jurisdiction of the court — Companies Act 1965 s 222*

The petitioner had obtained a judgment in the sessions court against the respondent which appeal is pending disposal. The respondent proceeded to file an application for the stay of execution of the judgment which is also pending disposal. In the interim, the petitioner — relying on the sessions court judgment — proceeded to issue a statutory notice, and upon the failure of the respondent to pay the judgment sum, the petitioner proceeded to file a petition for winding-up ('the petition'). Consequently, the respondent applied for all further proceedings in the petition be stayed pending the hearing and decision of the respondent's appeal pursuant to O 92(4) of the Rules of the High Court 1980 ('the Rules'), and/or under the inherent jurisdiction of the court; and/or alternatively under s 222 of the Companies Act 1965 ('the Act').

**Held**, granting the stay of proceedings:

Where the debt is disputed being a debt on a judgment subject of a further appeal to a superior court, it certainly cannot be said to be an undisputed debt; and the petitioner cannot at this stage claim to be a creditor of the respondent until that judgment obtained in his favour has become final and conclusive upon the disposal of the appeal. Until then, the debt is sub-judice, and any presentation of a petition for winding-up in the circumstances is an abuse of the process of court, and the courts will lend its willing hands to restrain the petitioner from presenting or proceeding of the petition under s 222 of the Act (see pp 439I and 440A).

Furthermore, in the face of the substantive law under s 222 of the Act, the inherent powers of the court under the Rules cannot be applied for or made available, as these powers are not substantive, and therefore the court cannot proceed cumulatively, but only proceed specifically in exercising its discretion for the stay under s 222 of the Act (see p 440F–G).

[**Bahasa Malaysia summary**

Pempestisyen telah memperolehi suatu penghakiman di mahkamah sesyen terhadap penentang yang mana rayuannya menunggu penyelesaian. Penentang terus memfailkan permohonan untuk penggantungan pelaksanaan penghakiman yang juga menunggu penyelesaian. Sementara itu, pempetisyen — yang bergantung pada penghakiman mahkamah sesyen — terus mengeluarkan suatu notis statutori, dan atas kegagalan penentang untuk membayar jumlah penghakiman, pempetisyen terus memfailkan petisyen untuk penggulungan ('petisyen tersebut'). Berikutnya, penentang memohon supaya semua prosiding lanjut dalam petisyen tersebut digantung sementara menunggu pembicaraan dan keputusan rayuan penentang menurut A 92(4) Kaedah-Kaedah Mahkamah Tinggi 1980 ('Kaedah tersebut'), dan/atau di bawah bidang kuasa sedia ada mahkamah; dan/atau secara alternatif di bawah s 222 Akta Syarikat 1965 ('Akta tersebut').

**Diputuskan**, membenarkan penggantungan prosiding:

Di mana hutang dipertikaikan merupakan hutang atas penghakiman tertakluk kepada rayuan lanjut kepada mahkamah atasan, sudah tentu ia tidak boleh dikatakan sebagai hutang yang tidak dipertikaikan; dan di peringkat ini pempetisyen tidak boleh mendakwa dirinya sebagai si piutang penentang sehingga penghakiman yang diperolehi memihak kepadanya telah menjadi terakhir dan muktamad selepas penyelesaian rayuan. Sehingga masa itu, hutang itu adalah sub-judice, dan apa-apa pengemukaan petisyen untuk penggulungan dalam keadaan demikian adalah penyalahgunaan proses mahkamah, dan mahkamah akan sedia membantu menahan pempetisyen daripada mengemuka atau meneruskan prosiding di bawah s 222 Akta tersebut (lihat ms 439I dan 440A).

Tambahan pula, memandangkan undang-undang substantif di bawah s 222 Akta tersebut, kuasa sedia ada mahkamah di bawah Kaedah tersebut tidak boleh dipohon atau disediakan, kerana kuasa-kuasa ini tidak substantif, dan dengan itu mahkamah tidak boleh teruskan secara kumulatif, tetapi hanya boleh teruskan secara khusus dalam melaksanakan budi bicara untuk penggantungan di bawah s 222 Akta tersebut (lihat ms 440F–G).]

**Notes**

For cases on stay of winding-up proceedings, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 899–906.

**Cases referred to**

*Pacific Centre Sdn Bhd v United Engineers (M) Bhd* [1984] 2 MLJ 143 (refd)

*R Rama Chandran v Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 (refd)

**Legislation referred to**

Companies Act 1965 ss 218, (e), 222
Rules of the High Court 1980 O 45, O 92(4)

*Paramalingam* (*Syarikat Radhakrishnan*) for the petitioner.
*K Sureindhren* (*Sothi & Ang*) for the respondent.

**Rekhraj J**: The petitioner had obtained a judgment on 17 April 1998 in the Kuala Lumpur Sessions Court SN 7-52-4945-97 against the respondent under a summary judgment procedure. The respondent has filed a notice of appeal to the High Court vide Civil Appeal No R1-12-194-98; and to date the appeal is pending disposal. The respondent had also proceeded to file an application for the stay of execution of the judgment; and the said application is also pending disposal by the sessions court.

In the interim, the petitioner — relying on the sessions court judgment — proceeded to issue a statutory notice pursuant to s 218 of the Companies Act 1965, demanding of the respondent to pay the judgment sum within 21 days from the receipt of the said statutory notice; failing which the respondent shall be deemed to be unable to pay the debt and an appropriate action shall be taken for the winding-up of the respondent company. Immediately upon the expiry of the 21-day period, the petitioner proceeded to file the petition.

This is an application by notice of motion taken out by the respondent against the petitioner that all further proceedings in the companies winding-up petition be stayed pending the hearing and decision of the respondent's Appeal No R1-12-194-98 pursuant to O 92(4) of the Rules of the High Court 1980, and or under the inherent jurisdiction of the court; and or in the alternatively under s 222 of the Companies Act 1965.

To my mind, such an application for the stay of winding-up petition is specifically provided for under s 222 of the Companies Act 1965, which reads:

> At any time after the presentation of a winding up petition and before a winding up order has been made, the company or any creditor or contributory may, where any action or proceeding against the company *is pending*, apply to the Court to stay or restrain further proceedings in the action or proceeding, and the Court may stay or restrain the proceedings accordingly on such terms as it thinks fit. (Emphasis added.)

Presentation of winding-up petitions are not a means of execution proceedings envisaged under O 45 of the Rules of the High Court, but are independent proceedings taken under s 218(e) of the Companies Act 1965, by proving the establishment of a 'debt due and payable'; in that it must be *due* at the time of the demand; and made enforceable by threat of winding-up proceedings. But where the debt is disputed, as in this case, being a debt on a judgment subject of a further appeal to a superior court, it certainly cannot be said to be an undisputed debt; and the petitioner cannot at this stage claim to be a creditor of the respondent until that judgment obtained in his favour has become final and conclusive upon the disposal of the appeal. Until then, the debt is sub-judice, and any

presentation of the petition in the circumstances is an abuse of the process of court, and the court will lend its willing hands to restrain the petitioner from presenting or proceeding of the petition under s 222 of the said Act.

I now refer to the prayer of the respondent in the invocation of O 92 r 4 of the Rules of the High Court 1980 or in the exercising of the powers of the court under its inherent jurisdiction to strike or grant stay. Order 92 r 4 reads:

> For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the court to make any Order as may be necessary to prevent injustice or to prevent an abuse of the process of court.

Edgar Joseph Jr J (now FCJ), in the case of *Pacific Centre Sdn Bhd v United Engineers (M) Bhd* [1984] 2 MLJ 143 at p 147 said:

> ... It is also clear that the inherent jurisdiction of the court includes all the powers that are necessary 'to fulfil itself as a court of law' to uphold, to protect or to fulfil the judicial functions of administering justice according to *law* in a regular, orderly and effective manner.

But in the case of *R Rama Chandran v Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145, his Lordship whilst referring to and quoting 37 *Halsbury's Law of England* (4th Ed) para 10 said:

> [Although Rules are a form of delegated legislation,] their function is to regulate the machinery of litigation; they cannot confer or *take away or alter or diminish* any existing jurisdiction or any existing rights or duties ... [*The Rules of the High Court cannot therefore extend into the area of substantive law.*] (Emphasis added.)

Therefore, I am of the view that in the face of the *substantive law* under s 222 of the Companies Act, the inherent powers of the court under the Rules of the High Court cannot be applied for or made available, as these powers are additional to, but not substantive, and therefore the court cannot proceed cumulatively, but only proceed specifically in exercising its discretion for the stay under s 222 of the Companies Act. Stay of proceedings of the petition is hereby granted until the final disposal of the appeal.

*Stay of proceedings granted.*

Reported by Loo Lai Mee